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No. 660

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IN THE

Supreme Court of the United States

KENNETH JACOBS, FLORENCE KARPF and JONAS MEKAS,

Appellants,

v.

PEOPLE OF THE STATE OF NEW YORK,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE TERM, FIRST JUDICIAL DEPARTMENT

JURISDICTIONAL STATEMENT

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IN THE

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OCTOBER TERM, 1966

No. .....

KENNETH JACOBS, FLORENCE KARPF and JONAS MEKAS,

Appellants,

vs.

PEOPLE OF THE STATE OF NEW YORK,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE TERM, FIRST JUDICIAL DEPARTMENT

JURISDICTIONAL STATEMENT

Appellants Kenneth Jacobs, Florence Karpf and Jonas Mekas appeal from an order of the Appellate Term of the Supreme Court of the State of New York, First Judicial Department, entered on December 9, 1965, affirming the judgment of conviction of the said appellants for violating New York's obscenity statute (Penal Law § 1141) by showing a motion picture entitled "Flaming Creatures". Appellants submit this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial federal questions are presented by this appeal.

A. Opinions Below

There were no opinions filed herein in either the Appellate Term of the Supreme Court of the State of New York or in the Criminal Court of the City of New York.

B. Jurisdiction

By an information filed by the District Attorney of New York County, appellants were charged with a violation of §1141 of the Penal Law of the State of New York in that on March 3, 1964 they arranged for or participated in the showing of an allegedly obscene film entitled "Flaming Creatures." Appellants pleaded not guilty and the case was heard by a three-judge bench of the Criminal Court of the City of New York, New York County, on June 2, 1964 and thereafter on June 10, 11, and 12, 1964. On June 12, 1964, the appellants were found guilty of violating § 1141 and on August 7, 1964, a sentence of sixty days in the City Workhouse, with the execution of the sentence suspended, was imposed upon the appellants Kenneth Jacobs and Jonas Mekas. Appellant Florence Karpf received a suspended sentence.

A notice of appeal to the Appellate Term of the Supreme Court of the State of New York, First Judicial Department, was thereafter filed. On December 9, 1965 an order without opinion was entered in that Court affirming the judgment of conviction below [Appendix A]. No further appeal as of right is granted under New York practice. However, leave to appeal to the Court of Appeals may be granted by one of the judges of that Court pursuant to § 520 of the Code of Criminal Procedure of the State of New York. In accordance with New York's procedure, such application was made, but leave was denied in an order entered on April 15, 1966 by the Honorable Stanley H. Fuld, Associate Judge of said Court [Appendix B].

Thereafter, on July 13, 1966, a notice of appeal to this Court was filed in the Criminal Court of the City of New York, New York County, which is the Court possessed of the record on appeal in this case.

Jurisdiction of this appeal is conferred on the Supreme Court by Title 28, United States Code, § 1257(2). *Roth* v. *U. S.* (*Alberts* v. *California*), 354 U. S. 476 (1957); *Smith* v. *California*, 361 U. S. 147 (1959); *Manual Enterprises* v. *Day*, 370 U. S. 478 (1962); *Jacobellis* v. *Ohio*, 378 U. S. 184 (1964); *Freedman* v. *State of Maryland*, 380 U. S. 51 (1965); *Trans-Lux Distributing Corp.* v. *Regents*, 380 U. S. 259 (1965); *A Book Named "John Cleland's Memoirs of a Woman of Pleasure"* v. *Attorney-General of Commonwealth of Mass.*, 383 U. S. 413 (1966); *Ginzberg* v. *United States*, 383 U. S. 463 (1966); *Mishkin* v. *People of the State of New York*, 383 U. S. 502 (1966).

C. Statutes Involved

Subdivisions 1 and 2 of § 1141 of the Penal Law of the State of New York, McKinney's New York Laws (1944), *Penal Law*, § 1141, are the pertinent sections of the statute, the validity of which is being challenged in this appeal. The relevant portions of the statute are set forth in Appendix C.

D. Questions Presented

The basic question presented by this appeal is whether § 1141 of the Penal Law of the State of New York is unconstitutional as violative of the "due process" clause of the Fourteenth Amendment and the guarantees of freedom of speech and of the press of the First Amendment to the United States Constitution, made applicable to the States by the Fourteenth Amendment, because:

1. as construed and applied below, and elsewhere by the New York Court of Appeals, the statute permits the Trial Court to exclude all expert testimony on the issues of (a)

the film's artistic merits, educational value and redeeming social importance, (b) the film's lack of prurient appeal, and (c) its acceptability under "contemporary community standards";

2. as construed and applied herein, and elsewhere by the New York Court of Appeals, the statute permits a holding that "Flaming Creatures" is obscene solely upon the basis that portions of the film portray conduct which if actually engaged in publicly would violate state statutes or public policy;

3. as construed and applied herein, the statute makes completely irrelevant and immaterial the circumstances under which the film was shown, including such matters as the special type of audience that viewed the showing, the nature of the appeal made, the purposes and methods of operation of the Film Makers Cooperative, which is the group that sponsored the showing, and the nature and reputation of the appellants, both professionally and personally; and

4. as construed by the New York Court of Appeals and applied herein, § 1141 permits a criminal obscenity conviction based merely upon knowledge by appellants of the contents of the film irrespective of the fact that the uncontradicted proof demonstrated (a) that appellants believed, in good faith, that "Flaming Creatures" is not obscene and that the film is a work of art and (b) that their showing of the film was in no way an attempt to pander to the prurient interests of their audience.

Related to this question of the validity of § 1141, as authoritatively construed by the courts of New York, there is also presented the additional issue whether the appellants' constitutional rights were violated by the application of § 1141 herein. That is, may appellants' convictions stand and their showing of the film be held criminal, where the film, taken as a whole, had absolutely no appeal to the

prurient interests to the audience present and is also of redeeming social importance and, in addition, the admitted and undisputed evidence of the circumstances under which appellants showed "Flaming Creatures" discloses that, as members of an *avant-garde* filmmaking group, they were seeking only to express a legitimate interest in the art of the cinema†

E. Statement of the Case

On March 3, 1964, a motion picture entitled "Flaming Creatures" (People's Exhibit No. 2) was shown at the New Bowery Theatre at 4 St. Marks Place, New York, New York (R. 20-21).*

Appellant Mekas arranged for the showing of the film (R. 79), appellant Jacobs conducted the actual showing (R. 28-31) and appellant Karpf acted as "ticket seller" (R. 21-22, 36-40). Each appellant knew the contents of the film, but each denied to the arresting officers that he or she thought the film was obscene (R. 35, 78-80).

In its case in chief, the People called only two witnesses —the arresting officers. Through them, the People proved the above facts which are not contested by appellants. However, throughout the trial and on appeal, appellants contended that § 1141 was unconstitutional on four principal grounds.

1. At the trial, the People offered no evidence on the issue of obscenity other than the film itself. The People offered no proof that the film appealed predominantly to prurient interests, violated contemporary community standards, and was without redeeming social importance. This alone required dismissal of the charge when appellants moved at the close of the People's case to dismiss the in-

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* All parenthetical references are to pages in the Record on Appeal, unless otherwise indicated by context.

formation and complaint upon the ground that the People had not made out a *prima facie* case because of this failure of proof. (R. 93-94 and 97-100; *Freedman* v. *Maryland, supra; Kahm* v. *United States,* 300 F. 2d 78 (5th Cir. 1962); and *United States* v. *Klaw,* 350 F. 2d 155 (2d Cir. 1965).)

This error was compounded when the trial court ruled inadmissible appellants' offers of proof during their case on the issue of obscenity. Expert testimony on each of the following issues was rejected: (a) The film was in fact utterly lacking in prurient appeal and that it did not have any capacity whatsoever to arouse or excite or impel the viewer to abnormal, unusual or anti-social behavior. (b) The film did not have the characteristics of "hard-core" pornography. (c) There were other films being shown throughout New York City and the nation which were similar to "Flaming Creatures" in their depiction of sex and nudity and that the community accepts or tolerates these films. (d) Most important, that the film was of artistic merit, educational value, cultural importance, and, in a phrase, of "redeeming social importance." (See offers of proof, pp. 137, 184; also, specifically, 145-47, 148-49, 167-68, 171, 184, 196-98, 199, 239, 240, 275.)

Testimony on these issues was offered through many persons well qualified because of their vast backgrounds in the theater, movies, the arts, education and psychiatry, to express their opinions on these vital issues in an obscenity case. These persons whose qualifications were not challenged (R. 135-36, 152, 158-59, 161) included Louis Allen, a well-known theater and film producer (R. 137-162); Willard Van Dyke, noted documentary motion picture producer (R. 162-72); Herman Weinberg, film historian and film teacher (R. 172-87); Susan Sontag, a leading reviewer of films and writer and teacher; Allen Ginsberg, one of America's foremost contemporary poets (R. 270-272); and Joseph Kaster, teacher of cultural history of ancient societies and member of the faculty of the New School for Social Research (R.

244-53). In addition, evidence on the psychological issues was proffered in the form of testimony by Drs. Edward Hornick and John Thompson, psychiatrists, the latter being an Associate Professor at the Albert Einstein School of Medicine, Yeshiva University in New York City (R. 282-84).

In each case, this tender of proof was excluded by the Court upon objection, which rejection was upheld on appeal.

Appellants argued below (Point I of appellants' brief in the Appellate Term) that if § 1141 excluded such expert testimony, the statute was unconstitutional since it deprived them of the opportunity to be heard on the key issue in their case, namely, whether "Flamingo Creatures" was obscene under the tests promulgated by this Court in and since its decision in *Roth* v. *United States*. Thus, the decision below, if permitted to stand, not only would effectively operate to deny appellants the most fundamental right in a criminal proceeding, i.e., "an opportunity to be heard" (*Smith* v. *California*, 361 U. S. 147, 171 (concurring opinion of Harlan, J.), but it also would nullify the First Amendment's protection of works of "redeeming social importance". Although the function of the judges who must decide obscenity cases is to determine the ultimate issue of obscenity, they must do so on the basis of testimony in the record on this issue. A judge should not be permitted to substitute his personal views as to whether the work in question has artistic merits or whether it violates contemporary community standards in its depiction of sex or nudity. If judges are to be allowed to make decisions on the basis of barren records, their decisions will of necessity reflect only their personal predilections. To make matters worse, these decisions will be on a subject that, by choice or circumstances or both, most judges are generally unqualified to render because of their limited experience or knowledge of the latest developments in the arts.

In *Dunn* v. *Maryland State Board of Censors*, 240 Md. 249, 213 A. 2d 751 (1965), the Court of Appeals said:

> "In our view, neither the judge who may sit in the Circuit Court to review the action of the Board nor the judges of this court ordinarily would be qualified to determine whether a film exceeded these constitutional standards or tests without enlightening testimony on these points." (213 A. 2d at p. 754)

See also concurring opinion of Frankfurter, J. in *Smith* v. *California*, 361 U. S. 147 at page 165 ff.; *Kahm* v. *United States*, 300 F. 2d 78 (5th Cir. 1962); *United States* v. *West Coast News Co.*, 228 F. Supp. 171 (W. D. Mich. 1964); *Yudkin* v. *State*, 229 Md. 223, 182 A. 2d 798 (1962); *In re Harris*, 56 Cal. 2d 879, 16 Cal. Rptr. 889, 366 P. 2d 305 (Cal. 1961). Compare, however, *Womack* v. *United States*, 294 F. 2d 204 (D. C. Cir. 1961) and the cases relied upon by the People in the Courts below (R. 110; Point II of appellee's brief in the Appellate Term); *People* v. *Muller*, 96 N. Y. 408 (1884); *People* v. *Finkelstein*, 11 N. Y. 2d 300 (1962) and *People* v. *Shapiro*, 6 A. D. 2d 271 (2d Dept. 1958).

At the trial, appellants were able to introduce two minor pieces of evidence of the film's "redeeming social importance" and its lack of prurient appeal. The first was a review of the film that was published in the Nation magazine on April 13, 1964, written by Miss Susan Sontag (Dfdts' Ex. E, p. 375, col. 2). In that review, Miss Sontag stated that the film was in no sense an appeal to the prurient, but was rather "a brilliant spoof on sex" (p. 375, col. 3) and that the incidents portrayed were not intended to arouse but were included solely for a legitimate artistic purpose (p. 376, col. 1).

> "*Flaming Creatures* is a triumphant example of an esthetic vision of the world—and such a vision is perhaps always, at its core, epicene. But this type of art

has still to be understood in this country. The space in which *Flaming Creatures* moves is not the space of moral ideas, which is where American critics have traditionally located art. What I am urging is that there is not only moral space, by whose laws *Flaming Creatures* would indeed come off badly; there is also esthetic space, the space of pleasure. Here Smith's film moves and has its being." (p. 376, col. 3)

In addition, Dr. Kaster pointed out that the film paralleled the ancient Dionysian myth, giving it sufficient educational value for him to show it to his classes at the New School (R. 248-49).

This limited proof was received in evidence only because the People chose not to object (see discussion, R. 160-61). In no sense did this constitute an adequate opportunity to be heard for it was but an insignificant portion of the proof appellants were prepared to offer on the issue of obscenity. The upholding of this arbitrary and unjustified exclusion of this evidence will have the inevitable result of making the First Amendment's protection of cultural freedom an empty exhortation.

2. Appellants' second contention is that New York's test for obscenity for films as authoritatively enunciated by its highest state court and specifically applied herein violates the First Amendment in two respects and is therefore constitutionally defective.

In the court below, the People relied principally on the decision of the New York Court of Appeals in *Trans-Lux Distr. Corp.* v. *Board of Regents*, 14 N. Y. 2d 88 (1964), which held that if any scene of any film portrayed any conduct which, if actually engaged in publicly, would violate a state statute or public policy, then the film was obscene. Although this Court reversed the judgment in the *Trans-Lux* case, the reversal was on other grounds and the *Trans-Lux* case was the principal case relied upon by the

People in the Court below as stating the law of New York as of the present date and in this criminal obscenity prosecution under § 1141 (R. 112 and Point I of the Appellee's Brief in the Appellate Term).

This "*per se*" test of obscenity violates two important tests of obscenity that have been promulgated by the Supreme Court. First, it violates the command of this Court that a work be judged as a whole, Second, it rejects consideration of artistic merit, intellectual content, cultural value and other pertinent factors. Therefore, as so authoritatively construed, § 1141 is unconstitutional.

3. Furthermore, § 1141 as construed and applied herein is unconstitutional because in a *criminal* obscenity case, the Court should have considered appellants' conduct as a whole and not just the contents of the film itself. The special nature of the audience that attended the group's showings; the purpose and methods of operation of the Filmmakers Cooperative; the nature of the appeal made; the appellants' purposes and intent; and the entire spectrum of facts surrounding the showings should have been weighed by the Courts below in determining whether appellants' conduct was criminal.

In *Roth* v. *United States,* Chief Justic Warren, concurring, wrote:

> "But there is more to these cases. It is not the book that is on trial; it is a person. The conduct of a defendant is the central issue, not the obscenity of the book or a picture. Each of the materials is, of course, relevant as an attribute of the defendant's conduct, but the materials are thus placed in context from which they draw color and character. A wholly different result might be reached in a different setting." (354 U. S. at p. 495)

The Chief Justice, thus pointed out, that the issue for decision in a criminal obscenity case is far different from

that presented in a case involving the obscenity of a work on its face. (See, e.g., *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General, supra.*) Any thoughtful discussion of obscenity must commence with the recognition that the concept has meaning only in context. The same material may or may not be obscene only when it is considered against the background of its showing or distribution.

This concept, which has been called the theory of "variable obscenity", is fully explored in Professors Lockhart and McClure's oft-cited article, *Censorship of Obscenity, The Developing Constitutional Standards*, 45 Minn. Law Rev. 5, where the authors wrote:

> "Variable obscenity provides solutions to most of the problems that constant obscenity leaves unresolved. Under variable obscenity, materials are judged by its appeal to and effect upon the audience to which the audience was primarily directed. In this view, material is never inherently obscene; instead, its obscenity varies with the circumstances of its dissemination. Material may be obscene when directed to one class of person but not when directed to another . . .". (p. 77)

In line with this reasoning, appellants sought to show at the trial; (1) that "Flaming Creatures" was not an attempt to pander to prurient interests; (2) that the film was sponsored by a group of cinematographers called the Film Makers Cooperative and that the showing was for the benefit of the maker of the film, Jack Smith (R. 259); (3) that the Film Makers Cooperative put on various programs of experimental films dealing with various subjects and that the Cooperative seeks to gain distribution of their members' *avant garde* film works (R. 238, 257-58); and (4) that in fact appellants were in no way seeking to pander to any prurient interests, but rather were a group that had made important contributions to the cultural life of our country and in the recent development of

the cinema in the United States. The appellant Mekas was the leader of this group (R. 238-39, 265). Although much of this testimony did come into the record, the Court did exclude testimony which would have explained fully the important role that the Film Makers Cooperative had played in the cultural life of the City of New York and the development of the film as a form of art (R. 256); the varied nature of the films made by the Film Makers Cooperative; their sincerity of purpose (R. 241); the recognition that the members of the group had received (R. 255-256); the sincerity of purpose of the film maker and his artistic standing (R. 205-206); the advanced audience to which the work was primarily directed (R. 256-257; 262-263); and whether or not the appellants were panderers of smut (R. 141, 144, 185-186, 251). It was generally the appellants' contention that it was in the setting of an *avant garde* group sincerely devoted to the arts that the conduct of the appellants should be judged.

In the instant case, we have a film the showing of which was motivated by a legitimate artistic purpose and not for the commercial exploitation of sex in cinema (Cf. *Ginzberg* v. *United States*, 383 U. S. 463). This factor is entitled to grant weight when judging whether the appellants engaged in criminal conduct when they arranged for the showing of a film made by a member of the Film Makers Cooperative. For it is the appellants who were tried, not the film. Since § 1141, as construed and applied by the courts of New York, holds such considerations irrelevant and immaterial, the statute imposes criminal sanctions upon the legitimate exercise of the First Amendment's guarantee of the right of free artistic expression, and, accordingly, is unconstitutional.

4. As construed below and by the Court of Appeals in other cases § 1141 is also unconstitutional since its requirement of *scienter* is so minimal that it has a debilitating effect upon the exercise of First Amendment rights.

Last term, in *Mishkin* v. *New York*, 383 U. S. 502, this Court had occasion to discuss the *scienter* requirement of § 1141. There, appellant urged that the section was unconstitutionally narrow since it permitted conviction so long as the defendant merely knew the contents of the material. This Court, however, in affirming the conviction, interpreted the decisions of the New York Court of Appeals as "authoritatively" holding the *scienter* requirement of § 1141 to be more exacting. The opinion quoted is *People* v. *Finkelstein*, 9 N. Y. 2d 342 (1961), where the Court of Appeals stated:

> "A reading of the statute (§ 1141) as a whole clearly indicates that only those who are in some manner aware of the character of the material they attempt to distribute, should be punished. It is not innocent but calculated purveyance of filth which is exercised. . . ."

Furthermore, in a footnote (86 S. Ct. at p. 964, ftn. 9), the opinion interpreted Judge Froessel's "parenthetical reference to knowledge of the contents of the books and the second *Finkelstein* case as not being intended to be a 'modification' of the above." It is respectfully contended that the Supreme Court's interpretation of New York law on the issue of *scienter* was not applied in this instance for the Court below has construed § 1141 to permit conviction based upon mere knowledge alone. This was the position urged by the People in the Appellate Term (Point I (B) of the Appellee's brief). That this is the law in New York is demonstrated by the fact that the convictions herein were based solely upon the conceded fact that the appellants knew the contents of the film. However, the uncontradicted proof was that each of them thought the film was a work of art and was not obscene. The honesty of this belief is supported by the circumstances under which the film was shown. The appellants were in no way commercializing on or seeking to pander to their audience's

prurient interests and there was no "calculated purveyance of filth." Therefore, it is respectfully submitted that the People's interpretation of § 1141 was the one followed herein and, as such, violates the First and Fourteenth Amendments to the Constitution since it imposes criminal sanctions upon those who in good faith seek to exercise their First Amendment rights.

Thus, for each of the four reasons stated above, it is respectfully submitted that § 1141 of the Penal Law of the State of New York, as authoritatively construed, is unconstitutional.

F. The Federal Questions Involved on This Appeal Are Substantial

It is respectfully submitted that the foregoing discussion demonstrates that the questions raised by this appeal involve substantial federal questions. In all of the previous cases where the Supreme Court has ruled on the question of obscenity, it has not been denied the benefit of expert testimony on the issue of artistic merit and other redeeming social importance—where it has been offered. Here, appellants were denied the opportunity to offer evidence on this issue as well as the related issues of prurient appeal and contemporary community standards. We submit that the procedure that is to be followed in obscenity prosecutions is of vital importance. The concern is not alone with the question of denying appellants their day in Court. Basically the issue is that if appellants are not permitted to offer evidence on these vital issues, the stringent tests laid down by this Court to limit the scope of obscenity statutes in order to protect First Amendment rights will prove utterly worthless in their application. The Supreme Court cannot possibly review every obscenity case. Consequently, an explicit requirement that the trial courts must consider and be bound by the testimony offered will provide a needed control. The ruling below permits the trial court

to decide obscenity cases on the basis of the personal moral sensibilities of each judge.

As to the issue of the obscenity of the film itself, there can be no doubt that in dealing with films, New York has deviated from the tests for obscenity enunciated by this Court in various decisions since the *Roth* case and especially this Court's decision in the *Jacobellis* case—that all works are protected unless they are "*utterly* without redeeming social importance." *Jacobellis* v. *Ohio*, 378 U. S. 184 at page 191.

The issue concerning the relevance and materiality of the conduct of the appellants and their purposes and intent is significant as a necessary measure to protect and to encourage the cultural and artistic life of the country. There can be no doubt that the affirmance of this conviction will have a "chilling effect" upon the experimental cinema of our country.

On the issue of *scienter*, it is respectfully submitted that the issue of the minimum constitutional requirement of *scienter*, which this Court expressly left open in *Smith* v. *California*, should now be resolved. The proof here was that the appellants were in no way engaged in pandering to prurient interests. In *Mishkin*, the proof was adequate to support the conviction based upon any requirement of *scienter*. Here, the uncontradicted evidence is otherwise; yet the conviction was upheld. Protection of First Amendment rights requires a stricter standard of *scienter* than that afforded by § 1141.

Finally, appellants urge that the attempt by the appellant Mekas and his colleagues to raise the artistic level of the cinema in the United States has been an important contribution to the cultural life of this country and, more directly, to the *avant-garde* cinema. The attack upon cultural freedom which this prosecution represents should not be validated by this Court which has in the past steadfastly

recognized the importance of legitimate artistic intent and expression. A free society requires cultural freedom and the First Amendment protects this ideal. It is therefore respectfully submitted that these convictions should not be upheld.

CONCLUSION

This appeal presents substantial federal questions. It is respectfully requested that the Court note probable jurisdiction and reverse the judgment below.

Respectfully submitted,

EMILE Z. BERMAN,
Attorney for Appellants.

DAVID G. TRAGER,
Of Counsel.

APPENDIX A

Order of Appellate Term.

At an Appellate Term of the Supreme Court, First Department, held on the County Court House, Borough of Manhattan, City of New York, on the 9th day of December 1965.

Present: Hon. Samuel H. Hofstadter, Justice Presiding,
" George Tilzer,
" William C. Hecht, Jr.,
Justices.

September No. 54

The People of the State of New York,

Respondent,

vs.

Kenneth Jacobs, Florence Karpf and Jonas Mekas,

Defendants-Appellants.

An appeal having been taken to this court by defendants from judgments of conviction of the Criminal Court of the City of New York, County of New York, after trial before Hon. S. Impelliteri, Castaldi, Rohan, on the 12th day of June 1964, upon the charge of violating Penal Law § 1141, and having been sentenced by Hon. Silver, Greenfield, Whitman, on the 7th day of August, 1964, as follows:

Jacobs & Mekas—each received 60 days in the workhouse, execution of sentence suspended.

and the said appeal having been heard and due deliberation having been had thereon,

IT IS ORDERED AND ADJUDGED that the said judgments so appealed from be and the same are hereby affirmed.

Enter,

SAMUEL H. HOFSTADTER,
Jutice Appellate Term,
Supreme Court, First Department.

APPENDIX B

Certificate Denying Leave.

STATE OF NEW YORK,
COURT OF APPEALS.

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

against

KENNETH JACOBS, FLORENCE KARPF and JONAS MEKAS,

Defendants-Appellants.

I, STANLEY H. FULD, Associate Judge of the Court of Appeals of the State of New York, certify that the above-named appellants, through their attorney, Emile Z. Berman, Esq., after notice to the District Attorney of New York County, and within the time and in the manner prescribed by section 520. of the Code of Criminal Procedure, duly presented to me an application for a certificate that questions of law were involved in the above matter which ought to be reviewed by the Court of Appeals. In such application, seeking leave to appeal from the order of the Appellate Term of the Supreme Court of the State of New York, entered on the 9th day of December, 1965, affirming the judgment of the Criminal Court of the City of New York, convicting the appellants of a violation of section 1141 of the Penal Law, it was argued that their convictions violated their rights under the First and Fourteenth Amendments of the United States Constitution in that (1) the film upon which the convictions were predicated was not obscene within the meaning of the statute; (2) expert testimony

with respect to contemporary community standards should not have been excluded; and (3) the statute as to scienter was unconstitutionally narrow because criminality was predicated upon the showing of a film which the appellants in good faith believed not to be obscene.

After hearing counsel and upon the record and proceedings herein, I am denying permission to appeal because, in my opinion, no question of law is presented which ought to be reviewed by the Court of Appeals.

Dated at New York, New York, April 15, 1966.

STANLEY H. FULD,
Associate Judge of Court of Appeals.

APPENDIX C

Statutes.

Penal Law

§ 1141. Obscene prints and articles

1. A person who sells, lends, gives away, distributes, shows or transmutes, or offers to sell, lend, give away, distribute, show or transmute, or has in his possession with intent to sell, lend, distribute, give away, show or transmute, or advertise in any manner, or who otherwise offers for loan, gift, sale or distribution, any obscene, lewd, lascivious, filthy, indecent, sadistic, masochistic or disgusting book, magazine, pamphlet, newspaper, story paper, writing, paper, card, phonograph record, picture, drawing, photograph, motion picture film, figure, image, phonograph record or wire or tape recording, or any written, printed or recorded matter of an indecent character which may or may not require mechanical or other means to be transmuted into auditory, visual or sensory representations of such character; or any article or instrument of indecent or immoral use, or purporting to be for indecent or immoral use or purpose, or who designs, copies, draws, photographs, poses for, prints, utters, publishes, or in any manner manufactures, or prepares any such book, picture, drawing, photograph, motion picture film, magazine, pamphlet, newspaper, story, writing, paper, card, phonograph, record, figure, image recording, matter, article or thing, or who writes, prints, publishes, or utters, or causes to be written, printed, published, or uttered, any advertisement or notice of any kind, giving information, directly or indirectly, stating, or purporting so to do, where, how, of whom, or by what means any, or what purports to be any, obscene, lewd lascivious[1]

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[1] So in original. A comma probably should follow "lascivious".

filthy, disgusting or indecent books, picture, photograph, motion picture film, writing, paper, card, phonograph record, figure, image, recording, matter, article or thing, named in this section can be purchased, obtained or had or who has in his possession, any slot machine, motion picture projector or other mechanical contrivance with moving pictures of nude or partly denuded female figures which pictures are lewd, obscene, indecent or immoral, or other lewd, obscene, indecent or immoral drawing, image, recording, article or object, or who shows, advertises, exhibits or transmutes the same, or causes the same to be shown, advertised, exhibited or transmuted, or who buys, owns or holds any such machine with the intent to show, advertise, transmute, or in any manner exhibit the same; provided, that this subdivision shall not apply to motion picture films licensed by the state department of education; or who,

2. In any manner, hires, employs, uses or permits any person to do or assist in doing any act or thing mentioned in this section, or any of them,

Is guilty of a misdemeanor, and, upon conviction, shall be sentenced to not less than ten days nor more than one year imprisonment or be fined not less than one hundred fifty dollars nor more than two thousand dollars or both fine and imprisonment for the first offense; for a second offense, shall be sentenced to not less than thirty days nor more than one year or be fined not less than two hundred fifty dollars nor more than three thousand dollars or be both fined and imprisoned; for a third offense, shall be sentenced to an indeterminate term of not less than six months nor more than three years and in addition thereto may be fined not more than five thousand dollars.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 660

KENNETH JACOBS, FLORENCE KARPF AND JONAS MEKAS, *Appellants,*

vs.

PEOPLE OF THE STATE OF NEW YORK, *Appellee.*

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE TERM, FIRST JUDICIAL DEPARTMENT

BRIEF OF AMICUS CURIAE IN SUPPORT OF JURISDICTIONAL STATEMENT

Interest of Amicus

Amicus submits this brief (with the consent of the parties, which is on file in the Clerk's office) because of its support, since its inception in 1947, of free expression in the arts and, in particular, its dedication to the encouragement of

innovation and experimentation by student film-makers. The Association, a confederation of nearly 300 student governments of colleges in the United States, representing hundreds of thousands of students who form the largest segment of the audience for contemporary cinema, has always sought to foster creativity in the making of motion pictures. In November, 1966, the Association, in conjunction with the Motion Picture Association of America and the Lincoln Center for the Performing Arts, sponsored a National Student Film Festival in New York which drew over 135 entries. The guiding criterion for the selection of entries for exhibition was excellence. The festival regulations specified that no censorship would be exercised. We believe, as our Codification of Policy declares, that no punitive action should be directed against those who seek to express ideas. We are filing this brief on the basis of our fear that, unless this case is reviewed and reversed, its restriction on the ability of film-makers to experiment and express ideas will inhibit all work, by students and others, in this medium and seriously handicap the development of film art.

Questions Presented

1. Whether Section 1141 of the New York Penal Law as construed and applied abridged appellants' freedom of expression and deprived them of due process by permitting the trial court to deny them the opportunity to introduce expert and other evidence bearing on the constitutional criteria of obscenity.

2. Whether Section 1141 of the New York Penal Law as construed and applied abridged appellants' freedom of expression by permitting them to be convicted of criminal obscenity in the absence of proof either that they believed

that the film was obscene or that the film had previously been adjudged obscene.[1]

Statement

This case involves an obscenity conviction of three members of a cooperative society of experimental film-makers for participating in one showing of an avant-garde motion picture for the benefit of that society. The description of the conduct of appellants and the movie itself constituted the entire case in chief for the People as well as substantially all the evidence the court was willing to entertain. In the presentation of their defense, appellants sought to present expert and other evidence bearing on the constitutional tests of obscenity. By a two-to-one vote the court repeatedly excluded the testimony that appellants wanted to adduce, leaving appellants' section of the record following the court's screening of the movie (R. 85)[2] virtually barren of anything but the witnesses' qualifications and appellants' exceptions to each of the court's restrictive rulings.

The case for the People—The people produced only two witnesses, Detectives Arthur Walsh and Michael O'Toole, who established that on the evening of March 3, 1964, a motion picture created by Jack Smith—"Flaming Creatures"—was shown at the New Bowery Theatre, a small room containing 92 seats, located at 4 St. Mark's Place in New York, New York (R. 20-21, 25-26). Appellant Jacobs ran the projector, appellant Karpf handled the ticket sales,

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[1] This question of the quality of *scienter* required by the First Amendment has already been briefed and argued in this Court this term in connection with the same statute. *Redrup* v. *New York,* No. 3, 1966 Term. Accordingly, while recognizing that this question is also presented on the record in this case, which reveals that appellants were familiar with the contents of the film, but believed it to be a work of art (R. 35, 78-80, 91), we do not discuss it in the Argument section of this statement.

[2] All R. references are to the Record on Appeal.

and appellant Mekas arranged for the showing (R. 22, 28-31, 33-34, 44, 70, 75, 78-79, 92). All of the appellants had seen the movie previously and considered it to be a work of art (R. 35, 78-80, 91). Detective Walsh thought otherwise. He classified the film alternatively as "garbage" (R. 35) or as "indecent, lewd and obscene" (R. 5, 63). He and Detective O'Toole arrested appellants and seized the film in the absence of any arrest or search warrants, pursuant to strategy planned two days before in the District Attorney's office (R. 34, 48-50, 76, 78). The People relied on the movie "on its face" to complete their case (R. 79) and did not submit any other evidence with respect to any of the constitutionally required elements of obscenity.

The defense—Before appellants were able to swear in their first witness, the prosecutor objected "to any line of questioning dealing with a question of artistic merit or community standards" (R. 135-136). The court noted the objection, but waited until appellants called Louis Allen, an established, successful producer of plays and motion pictures, including *Lord Of The Flies*, who knew appellant Mekas as a recognized film critic and the editor of one of the outstanding magazines treating film as an art form (R. 137-141, 143-144). The court refused to allow Allen to state and explain his view that the film was a serious, talented work of art that poetically and wittily satirized advertising, fashion, love, and society's use of sex (R. 146-148, 150). Nor would they let him express his opinion either about contemporary community standards or the reactions of average persons to such a picture (R. 145-147, 152). His description of a film created by Ingmar Bergman, *The Silence*, which portrayed comparable scenes and was being widely commercially exhibited to large audiences, particularly in New York (where its showing had been approved by the Board of Regents) was intended to illustrate com-

munity standards, but was excluded, with Judge Rohan in the minority (R. 154-156, 159-160).[3]

The court treated every other witness that appellants brought to the stand in similar fashion. Willard Van Dyke was able to inform the court that he was a producer of hundreds of documentary films, particularly ones dealing with community problems and mores, as well as a film festival judge (R. 163-164, 169-170). All of this background did not enable Van Dyke to testify that he viewed "Flaming Creatures" as a work of art or how he regarded its cinematic quality from the point of view of technique (R. 165-167, 170-171). Like Allen, he was prevented from referring to other films depicting sexual objects and activities equivalent to those contained in "Flaming Creatures" (R. 168-169).

Herman Weinberg told the court that he was a teacher of film history at the City College of New York (where his course studied contemporary community standards relating to motion pictures), a critic, a film festival judge, and an author engaged in a ten-year study of movie morals and film censorship (R. 173-178, 181). That was all the court was willing to hear from him. It ruled inadmissible his opinion that "Flaming Creatures" was an aesthetic production that satirized sex and an experimental film that employed artistic technique. (R. 182, 184). It refused to countenance any discussion of comparable films then playing (R. 182-184).

Susan Sontag was introduced to the court as a novelist, teacher of philosophy at Columbia University, and a writer

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[3] Judge Rohan's dissent was either expressed by him or noted by Presiding Judge Impellitteri to almost every action of the court thereafter in sustaining the People's objections to the admissibility of evidence proffered by appellants (R. 161-162, 165, 168, 170, 171, 180, 181, 183, 184, 197-198, 199, 201, 203, 204, 205, 239, 240, 248, 249, 250, 251, 273, 274, 275, 283, 284, 288).

of considerable film criticism, including a three-page analysis and critique of "Flaming Creatures" that appeared in the April 13, 1964 issue of *The Nation* and was admitted into evidence (R. 191-198). She defined the avant-garde movement in film in terms of "a small group of people who are doing experimental work that is usually just mainly followed by critics and by other artists" (R. 193, 209-210), but was barred from setting forth her opinion of the film's predominant appeal and her knowledge of similar films and Jack Smith's artistic talents (R. 196-206).[4]

After Miss Sontag left the stand, appellants' counsel moved for a mistrial on the ground that the majority of the court had apparently already determined that the movie was obscene and, therefore, was foreclosing appellants from presenting any evidence in their behalf (R. 206-207, 231-235). The court, in denying this motion, ruled that it had not arrived at any conclusion as to appellants' guilt or innocence and reasserted its admissibility rulings (R. 235-236), with Judge Rohan carefully explaining the basis of his refusal to go along with the majority (R. 227-230).

All of appellants' remaining witnesses were also shut off as soon as they had stated their qualifications. Shirley Clark, a film-maker, director and instructor in film literature at Columbia University, was limited briefly to describing the Film-Makers' Cooperative as a distributor of experimental films and could not voice her opinion of the film's artistic value or on the artistic purpose of the members of the Cooperative (R. 238-242). Joseph Kaster, a

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[4] Primarily in response to questioning by the court, the meaning of Miss Sontag's review was explored, particularly those portions which dealt with her characterization of the film as an unconventional, artistic treatment of themes which, by current community standards, were ludicrous or ridiculous to most men, as a brilliant work of art about joy and innocence that satirically and mockingly confronted sex, including perverse sex scorned by most men, and as a non-pornographic depiction of sexual embraces and nakedness, too full of pathos and ingenuity to be prurient (R. 211-214, 218-226).

Ph.D. teacher of numerous courses at the New School for Social Research, testified that he had shown "Flaming Creatures" to his class of 40 adults who were studying the myths and rituals of Western Civilization (R. 244-247), but successful, repeated objections blocked him from linking the film to any particular myth, theme, or portion of ancient history and, thereby, highlighting its educational, historical, and artistic value (R. 247-252).

Robert Trumbull, a volunteer clerk at the Film-Makers' Cooperative, who was familiar with the functions and operations of the organization, was not able, because of objections which were sustained, to address the court fully on the subject of the Cooperative's history or the nature of its membership (R. 254-257). He did indicate that the New Bowery Theatre was operated by the American Theatre for Poets, Inc. (a group into whose composition the court refused to allow inquiry), through whom the film's showing on March 3rd was arranged (R. 256-257).

Allen Ginsburg, poet and lecturer on American culture, knew Jack Smith and the movie, and was familiar with contemporary art in all its forms, but his opinion that the film had aesthetic and artistic value as well as social importance was stricken from the record (R. 270-274).

The People and appellants stipulated that had appellants called Charles Levine, who was present at the showing of "Flaming Creatures" on March 3rd, he would have testified that the audience was composed entirely of adults who were well-behaved and exhibited no abnormal reaction or behavior during the film (R. 280-281), and further, that if appellants had called Drs. Edward Hornick and John Thompson, both highly qualified psychiatrists and professors of medicine, each would have testified that he had seen the movie and in his opinion it was an artistic effort, the effect of which was the opposite of exciting, arousing, or impelling the viewer to abnormal anti-social conduct (R.

281-284, 286-288). The People's objections to the proposed testimony were sustained (R. 283-289).

Appellants moved to dismiss the complaints against them on the grounds that the People had not proven beyond a reasonable doubt that the film was obscene in accordance with the constitutionally permissible test, that there was an appeal to anyone's prurient interest, that there was commercial exploitation of sex, or that appellants had the requisite guilty knowledge (R. 290-292, 299-300). In reply, the People, contended, among other things, that the case law ruled out artistic merit as an adequate answer to a charge of obscenity and that motion pictures had less thematic freedom under the Constitution than speech or literature. Appellants' motion was denied without explanation (R. 302).

The Questions Are Substantial

The issues involved in this appeal are the inevitable sequel to this Court's decisions last term in *Memoirs* v. *Massachusetts*, 383 U.S. 413, *Ginzburg* v. *United States*, 383 U.S. 463, and *Mishkin* v. *New York*, 383 U.S. 502. The viability of the test of obscenity set forth in those cases and, previously, in *Roth* v. *United States*, 354 U.S. 476, 489, as well as the ability of this Court to exercise its "independent constitutional judgment on the facts of the case as to whether the material involved is constitutionally protected," *Jacobellis* v. *Ohio*, 378 U.S. 184, 190, ultimately depend upon the evidence which state (and federal) courts are willing to consider in trying obscenity cases. If the trial courts are free to turn their backs on every defense attempt to introduce evidence, expert and otherwise, bearing on (1) the artistic and educational merits of the material, (2) the prevailing community standards and the degree of public acceptance of comparable material, (3) the nature of the predominant appeal of the material for both adults and

the special audience to which it was directed, (4) the character of the audience for which the material was designed and to which it was directed, (5) the manner in which the material was promoted, and (6) the good reputation of its creator and its distributor, then the standards of obscenity adopted by this Court will be hollow words and its responsibility to supervise and review will be frustrated.[5]

Members of this Court have commented upon the need for and value of various types of testimony, especially that of expert witnesses, offered by obscenity defendants. See especially, Frankfurter, J., concurring, and Harlan, J., concurring in part and dissenting in part, in *Smith* v. *California*, 361 U.S. 147, 160, 164-167 and 169, 171-172. See also Brennan, J., in *Jacobellis* v. *Ohio*, *supra*, 378 U.S. at 196 (reliance upon favorable criticism and widespread exposure of film) and in *Memoirs* v. *Massachusetts*, *supra*, 383 U.S. at 415-416, n.2 and 419 (reciting expert testimony); Doug-

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[5] Model Penal Code §251.4 (Proposed Official Draft, 1962) reads as follows:

"(4) Evidence; Adjudication of Obscenity. In any prosecution under this Section evidence shall be admissible to show:

(a) the character of the audience for which the material was designed or to which it was directed;

(b) what the predominant appeal of the material would be for ordinary adults or any special audience to which it was directed, and what effect, if any, it would probably have on conduct of such people;

(c) artistic, literary, scientific, educational or other merits of the material;

(d) the degree of public acceptance of the material in the United States;

(e) appeal to prurient interest, or absence thereof, in advertising or other promotion of the material; and

(f) the good repute of the author, creator, publisher or other person from whom the material originated.

Expert testimony and testimony of the author, creator, publisher or other person from whom the material originated, relating to factors entering into the determination of the issue of obscenity, shall be admissible. The Court shall dismiss a prosecution for obscenity if it is satisfied that the material is not obscene."

las, J., in *Memoirs* v. *Massachusetts, supra*, 383 U.S. at 427 (the wisdom of experts must be evaluated) and in *Ginzburg* v. *United States, supra*, 383 U.S. at 485-488 (the court should honor the experts' opinions); Harlan, J. in *Memoirs* v. *Massachusetts*, 383 U.S. at 459 (experts' testimony should be accepted as decisive of social value); White, J. in *Memoirs* v. *Massachusetts*, 383 U.S. at 462 (court to decide social importance on the basis of all the evidence, including that from experts). Until now, however, this Court has never passed upon the due process right of defendants charged with obscenity to introduce at least some evidence, expert or otherwise, relevant to each of the criteria specified above which form the constitutionally compelled definition of "obscenity." Now that this Court has more fully elaborated its standards setting the permissible bounds of censorship by criminal prosecution, it should seek to insure adherence to those standards and prevent their evasion not only through formal instructions and decisions, but also through the more indirect method of curtailing the due process right of obscenity defendants to present their case.

What occurred in this case is highly instructive. The Criminal Court rejected outright appellants' efforts to provide it with material bearing upon its determination of whether or not "Flaming Creatures" was obscene. The exclusionary rulings of Judge Impellitteri and Castaldi (Judge Rohan dissented) were all-inclusive, encompassing not only oral opinion testimony by experts (R. 145-159, 165-171, 179-184, 196-199, 239-240, 248-252, 272-275, 280-288), but also film contents comparisons (R. 154-159, 168-169, 182-184, 199-205) and testimony from eyewitnesses and others with personal knowledge of the matters about which they were questioned (R. 184-187, 206-207, 241-242, 256-257, 280-281). The court was unwilling to hear evidence, whatever its form, concerning the artistic value and other social importance of the film, including the proffered opinion that

it was an artistic, poetic work (R. 147-148, 150, 165-167, 182, 184, 273-274, 282, 287), a satire on sex in our culture (R. 147-148, 150, 184), a modern version of the Dionysian myth (R. 247-252) and an unconventional experiment challenging both traditional cinematic technique and traditional attitudes (R. 165-167, 184). Every attempt by appellants to introduce evidence on community standards was equally turned aside, particularly their efforts to demonstrate that films containing equivalent scenes of sexual contact were being widely exhibited in this country and in New York itself, where they had been licensed (R. 154-159, 168-169, 179, 182-184, 199-205). The same treatment was accorded testimony directed to discovering the film's predominant appeal for and effect upon not only ordinary adults, but also appreciators of and participants in the avant-garde movement and the audience which viewed it on March 3rd (R. 145-150, 167-168, 170-171, 180-181, 196-199, 239-240, 250-251, 275, 282-285, 287-288).

Proof directed to the role of the Film-Makers' Cooperative in dealing in avant-garde films for select audiences who were concerned with film as an art form, the character of the audience in attendance on March 3rd, and the nature of the group under whose auspices the theatre was obtained that night was excluded (R. 256-257, 262-263, 280-281). Although the trial court allowed the prosecution to point out the manner in which the film was promoted—one public notice, not an advertisement, in *The Village Voice* (R. 267-268), it severely limited appellants' ability to reconstruct the non-commercial, artistic setting (R. 256-257, 262-263, 280-281). Finally, the court ruled out all evidence designed to show the reputation of either Jack Smith, the picture's creator, or Jonas Mekas, its distributor (R. 184-187, 205-206, 241-242).

As a result of the trial court's unyielding refusal to permit appellants to enlighten it upon any of the elements of

the constitutional test of "obscenity", in conjunction with the People's utter failure to do so, this Court is confronted with a conviction whose basis is impossible to ascertain. Did the trial court, acting two weeks before this Court rendered its decision in *Jacobellis* v. *Ohio, supra,* reject social and artistic importance as a test independent of prurient appeal? Did it act, after viewing the movie, upon the theory that no social value, whatever its evidentiary support, could outweigh the film's prurient appeal and patent offensiveness? Or did it think that artistic and social value measured by the concerns of a cultural minority either was not properly cognizable or else could never be more than minimal, hence constitutionally insignificant? Or did the majority of the judges feel that they were fully competent to decide by relying upon their own personal views of the film's worth unaided by any testimony at all? The record of the People's objections and the court's exclusionary rulings is ambiguous enough to support any and all of these readings. The first three positions involve erroneous interpretations of the constitutional standard. The last provides a conveniently inscrutable mask behind which the trial court could conceal more fundamental error.

The People in their Motion to Dismiss or Affirm highlight the extraordinary discretion the trial courts may presently exercise to permit some obscenity defendants to put on their case yet bar others, particularly those who appeal to unconventional artistic and social values, from having their day in court. Redeeming value, the People suggest, "must be judged by the courts, perhaps, in some cases, with the aid of experts and critics." Motion, p. 8. What the People essentially want this Court to affirm, given its (although not necessarily the trial court's) acceptance of *Jacobellis* v. *Ohio, supra,* and *Memoirs* v. *Massachusetts, supra,* is the proposition that certain works may so offend particular judges and be so devoid, "on their face" as viewed by such judges' private images of the average man,

of artistic and social value, that the judges can properly label them obscene and decline to hear any evidence the defense may tender of subtle values neither obvious nor intelligible to the judges or, perhaps, the average man.

To sanction this approach by allowing trial judges to make their own independent value judgments unhampered by any requirement that they admit any properly presented evidence on each of the six factors specified *supra*, pp. 8-9, is to remove all the protections this Court believed it had erected in *Roth* v. *United States supra*, and its successors, for the work whose artistic and social values are apparent only to and appreciated only by a minority on the frontiers of artistic expression and human knowledge, *i.e.*, the avant-garde. Unless this Court takes the opportunity, provided by this appeal, to elaborate minimal rules of admissibility incumbent upon courts handling obscenity cases, it will not be able satisfactorily to safeguard First Amendment freedom of expression for minorities who experiment with ideas and designs and techniques. The result of silence in this matter will be to countenance the stifling of creativity, while pretending to protect it. The constitutional standards will not operate to assure that works with redeeming value are distributable, but rather as camouflage for their suppression and the negation of the possibility of effective, independent judicial review.

This case is by no means an isolated instance. The threat to freedom in the modern cinema and, indeed, the novel, the painting, and the theatre of the 1960's that this case so clearly dramatizes will remain until this Court offers direction to trial judges on the limits of their power to exclude evidence in obscenity cases. The courts are already in considerable conflict as to how to proceed. The Fifth Circuit, the Western District of Michigan, and the highest courts in California and Maryland would supplement the judges' "necessarily limited, hit-or-miss subjective view[s]", *Smith* v. *California*, *supra*, 361 U.S. at 165

(Frankfurter, J. concurring) with expert evidence on such matters as social value and contemporary community standards. *Kahm* v. *United States*, 300 F.2d 78, 84 (5th Cir. 1962); *United States* v. *West Coast News Co.*, 228 F. Supp. 171, 182-191 (W.D. Mich. 1964); *In re Harris*, 56 Cal. 2d 879, 16 Cal. Rptr. 889, 366 P.2d 305 (1961); *Dunn* v. *Maryland St. Bd. of Censors*, 240 Md. 249, 213 A.2d 751, 754 (1965). The District of Columbia Circuit and the New York courts are on record as banning various forms of defense evidence where the work is allegedly obscene "on its face." *Womack* v. *United States*, 294 F.2d 204, 206 (D.C. Cir. 1961); *People* v. *Finkelstein*, 11 N.Y.2d 300, *cert. denied*, 371 U.S. 863 (1962), *People* v. *Muller*, 96 N.Y. 408 (1884).

We do not ask this Court to require that trial courts be bound by the views of experts or by proof adduced by other means. We do not suggest that judges be placed in an evidentiary straitjacket with their right to make the ultimate conclusion of law as to obscenity *vel non* preempted. We do urge that they be required, before coming to that conclusion, at least to listen to views of experts and take cognizance of other defense evidence relevant to the constitutional standards in order to temper their personal reactions, prevent their concealing attitudes hostile to the controlling standards, provide a record substantial enough to enable this Court to utilize fully its power of review, and uphold the integrity of the First Amendment as it shelters unorthodox, experimental, and creative expression.

Conclusion

For the reasons stated above, this appeal presents substantial federal questions. The Court should note probable jurisdiction and reverse the judgment below.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1966

No. 660 Misc.

KENNETH JACOBS, FLORENCE KARPF and JONAS MEKAS,

Appellants,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Appellee.

MOTION TO DISMISS OR AFFIRM

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KENNETH JACOBS, FLORENCE KARPF and JONAS MEKAS,
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THE PEOPLE OF THE STATE OF NEW YORK,
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MOTION TO DISMISS OR AFFIRM

Pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, appellee moves to dismiss the appeal in the above-entitled action on the grounds that the appeal (1) is moot and (2) does not present a substantial federal question.

Jurisdiction

The appellants seek to invoke this Court's jurisdiction under 28 U. S. C. §1257(2) by contending that Section 1141 of the New York Penal Law, as construed and applied to this case, violates the "due process" clause of the Fourteenth Amendment and the guarantees of freedom of speech and freedom of the press of the First Amendment, applicable to the States through the Fourteenth Amendment.

The Statute Involved

Section 1141 of the New York Penal Law, in pertinent part, reads as follows:

> "1. A person who sells, lends, gives away, distributes, shows or transmutes * * * any obscene, lewd, lascivious, filthy, indecent, sadistic, masochistic * * * motion picture film * * * which may or may not require mechanical or other means to be transmuted into auditory, visual or sensory representations of such character * * *
>
> "2. Is guilty of a misdemeanor, and, upon conviction, shall be sentenced to not less than ten days nor more than one year imprisonment. * * *"

Questions Presented

1. Does mootness command the dismissal of the appeal?

2. Is the film in question obscene?

3. Does proof of the appellant's knowledge of the contents of the film satisfy the requirement of scienter?

4. Does due process compel the trial court to accept all evidence offered by the defense in its attempt to establish the current community standards and the social importance of the material at issue?

Statement

The appellants were convicted on June 12, 1964, after trial in the Criminal Court of the City of New York, New York County, of violating Section 1141 of the Penal Law. On August 7, 1964, appellants Kenneth Jacobs and Jonas Mekas were each sentenced to sixty days' imprisonment, execution of the sentence was suspended. Appellant Florence Karpf was given a suspended sentence.

The Appellate Term, First Department, unanimously affirmed the judgment of conviction on December 9, 1965, and Honorable STANLEY H. FULD denied leave to appeal to the Court of Appeals on April 15, 1966.

THE EVIDENCE

I. The People's Case

On March 3, 1964, a motion picture made by Jack Smith entitled "Flaming Creatures" (People's Exh. 2) was shown at the New Bowery Theatre at 4 St. Marks Place in New York City (20-1).* Appellant Jonas Mekas arranged for the showing of the film (79), appellant Kenneth Jacobs conducted the actual showing (28-31) and appellant Florence Karpf acted as ticket seller (21-2, 36-40). Each appellant was thoroughly familiar with the content of the film, but all denied to the arresting officers that the film was obscene (35, 78-80).

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* All references are to the pages of the Record on Appeal.

II. The Defense

Susan Sontag, a teacher and a writer, testified that she had seen "Flaming Creatures," and that her review of the film had appeared in the publication "The Nation" on April 13, 1964 (Defendants' Exh. E). Objections to questions put to the witness concerning her opinion on whether the film appealed to prurient interests and was pornographic were sustained (197-9).

Joseph Kaster, member of the faculty of the school of Social Research, testified that he showed "Flaming Creatures" to his adult class as part of his instruction on witchcraft, magic and sorcery as they relate to the myths and rituals in Western Civilization (246-7). He testified that there is a definite parallel between "Flaming Creatures" and the Dionysian myth (248-9). He was not allowed to give his opinion as to whether the film was hard-core pornography (249-51).

Richard Leslie Trumbull, a volunteer clerk for the Film Makers' Co-operative, an informal organization dedicated to gain distribution for the films of its members, testified that on the date the appellants were arrested, the film "Flaming Creatures" was being shown at a benefit for the Film Makers' Co-operative, and that one of the purposes of the showing was to raise money for the maker of the film, Jack Smith (255, 259-61, 266). He also testified that a public notice for the showing was put in a newspaper called the *Village Voice* (267).

The following testimony offered by the defense was rejected by the court as incompetent and irrelevant:

1. The opinion of **Louis Allen**, theatre and film producer, that "Flaming Creatures" is a work of art and does not appeal to the prurient interests of adult people (137-62).

2. The opinion of **Willard Van Dyke**, documentary motion picture producer, that "Flaming Creatures" is a work of art with regards to its cinematographic techniques and that the film does not arouse prurient interests (162-72).

3. The opinion of **Herman Weinberg**, film historian and teacher at the City College of New York, that the film is not hard-core pornography, but rather an aesthetic work of art (172-87).

4. The opinion of **Shirley Clark**, a motion picture director, that "Flaming Creatures" is not hard-core pornography but a film of artistic value (236-43).

5. The opinion of **Allen Ginsberg**, a poet, that the film has social importance and does not appeal to prurient interests (270-72).

6. The opinions of two psychiatrists, Dr. **Edward Hernich** and Dr. **John Thompson**, that "Flaming Creatures" does not excite the viewer to abnormal behavior, and that the film is not obscene (281-9).

POINT I

The appeal is moot.

In *St. Pierre* v. *United States*, 319 U. S. 41, 42-43 (1943), this Court, in dismissing a certiorari petition, held:

> "A federal court is without power to decide moot questions or to give advisory opinions which cannot affect the rights of the litigants in the case before it (cits. om.). The sentence cannot be enlarged by this Court's judgment, and reversal of the judgment below cannot operate to undo what has been done or restore to petitioner the penalty of the terms of imprisonment which he has served. Nor has petitioner shown that under either state or federal law further penalties or disabilities can be imposed on him as a result of the judgment which has now been satisfied."

Under the criteria of *St. Pierre*, the instant appeal is moot as to all of the appellants. In August of 1964, the appellants were given suspended sentences. For the next year, the maximum time for which the appellants could have been sentenced [New York Penal Law §1141(2)], the sentencing court could have revoked the suspended sentences and imposed prison sentences [New York Code of Crim. Proc. §470-a]. Now, the year having run and the sentencing court thus having lost its power over the appellants, their appeal is moot unless they show legal "disabilities" flowing from the judgment of conviction [*St. Pierre* v. *United States, supra* at 43; see *Fiswick et al.* v. *United States*, 329 U. S. 211, 221-222 (1946)]. The appellants allege no such disabilities nor could they, for neither New York nor federal law imposes any further penalty upon conviction of the misdemeanor here in issue. The case is moot and should therefore be dismissed.

POINT II

No substantial federal questions are presented.

(1) The Film "Flaming Creatures" is Obscene.

The film entitled "Flaming Creatures" is a 16 mm. black and white, sound production, running forty-two minutes. It is comprised of several separable sequences, all of them depicting some form of transvesticism or abnormal sexual behavior. One of the sequences concerns a sexual attack upon a female by four individuals, some dressed as women, with the camera focusing at times on the "victim's" bare breast which is being violently shaken by a participant in the assault, and dwelling at other times on the subject's uncovered pubic area which is being massaged by another attacker. In other sequences, there are numerous scenes of male masturbation. Such depictions of penises and pubic regions, portrayed in the perverse manner they are here, debase both the sexual act and the human body and are clearly hard-core pornography. These patently offensive scenes, comprising the predominant part of the film, have no possible social or artistic value, and the trial court as well as the appellate court were justified in determining that the film, which was shown commercially to the general public, is obscene.

The appellants not only contest the trial court's ultimate determination on the issue of obscenity, but argue that the judgment must be vacated simply because the People offered no proof that the film appealed to prurient interests, violated contemporary community standards, and was without redeeming social importance.

This Court in *Roth* v. *United States,* 354 U. S. 476 (1957), endorsed as a test of obscenity: "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interests" [*id.* at 489]. Moreover, it was held that the material must be utterly without social importance and patently offensive in that it goes substantially beyond customary limits of candor in representing sexual matters [*id.* at 484; *Manual Enterprises, Inc.* v. *Day,* 370 U. S. 478, 482-486 (1962)]. This Court recently reaffirmed all of these standards [*Jacobellis* v. *Ohio,* 378 U. S. 184, 191-192 (1964)]. Commercial exploitation through advertising emphasis on the appeal to the prurient, a criterian advanced in *Ginzburg* v. *United States,* 383 U. S. 463 (1966), to be used as an additional aid in determining the character of borderline material, is not an issue here. Although the commercial showing of the film was advertised in a local paper, there was no claim that the advertisement contributed to the film's pornographic quality.

There are actually three separate standards upon which constitutional protection rests, any one of which can support the lawful dissemination of material. Each standard must necessarily be judged independently. Due to the fact that subtle artistic merit is sometimes beyond the aesthetic appreciation of the average man, the standard of redeeming social value must be judged by the courts, perhaps, in some cases, with the aid of experts and critics. "Appeal to the prurient interest" must be taken literally and alone, and must be judged in terms of the audience for which the material is designed and the susceptibility of those the material is likely to reach [*Mishkin* v. *New York,* 383 U. S.

502 (1966)]. Where, as here, the pornography involved is the hard-core variety, easily discernible without special expertise, the people certainly may rely upon the material itself to establish a *prima facie* case as to its lack of social importance and its appeal to the prurient [*Womack* v. *United States*, 294 F. 2d 204 (D. C. Cir. 1961); *People* v. *Finkelstein*, 11 N. Y. 2d 300, 305 (1962), cert. denied 371 U. S. 863 (1962)].

The decision of Judge Moore in *United States* v. *Klaw*, 350 F. 2d 155 (2d Cir. 1965), does not compel the acceptance of the appellants' argument that the People failed to prove prurient appeal. The *Klaw* case held that the conviction for the circulation of sado-masochistic literature alleged to appeal to the prurient interests of the deviate must be reversed because there was nothing presented to the jury which would enlighten them as to the nature of the appeal of the "bondage" material. This holding goes far beyond any pronouncements of the United States Supreme Court and is clearly not the law in New York. Moreover, the opinion is confined to the question of the prosecution's responsibility of proving the prurient appeal of the atypical material there involved, and does not apply to material whose appeal is easily detectable from its face.

Patent offensiveness must be evaluated in terms of contemporary community standards, and this is always the domain of the average man who is the most expressive and understanding of the community's tolerance. Clearly the trier of fact is competent, without the assistance of the prosecution, to determine the community's current attitudes on what is patently offensive by applying common sense, experience and the knowledge which comes from being a member of the community. The issue of whether the People

must establish the standards of the community is now before this Court in *Phelper* v. *Decker*, #374 Oct. 1966 Term, certiorari having been granted.

(2) *Scienter* was Established.

A conviction under Section 1141 cannot be upheld without proof of the element of *scienter* [*People* v. *Finkelstein*, 9 N. Y. 2d 342 (1961)], and the appellants claim that *scienter* was not established by the evidence presented at their trial. Although the appellants admit their familiarity with the film's content, they contend, in essence, that their knowledge must cover both fact and law, and that they must be shown to have believed that the film would be classified obscene by judicial determination. In the absence of a prior restraint upon the particular material, this would necessarily call for an assessment of the outcome of an adjudication all but impossible for even the most trained and knowledgeable lawyers to make. Moreover, guilt cannot depend upon the offender's own appraisal of the legal significance of his conduct, for then a man could acquit himself by his own belief in his innocence. The defense of "honest mistake," insofar as it should be available, cannot refer to the mistake of law the appellants claim they made, but must describe a mistake in factual evaluation. In *Ginzburg* v. *United States, supra,* the defendant believed that his material was protected by prior Supreme Court rulings, yet his belief did not prevent his conviction, for he knew precisely the contents of his publication. In sum, *scienter* is established when it is proved that the accused was not ignorant of the facts upon which his liability is predicated. Moreover, precisely this issue was argued to this Court in *Redrup* v. *New York*, #3 Oct. 1966 Term.

(3) The Opinion Testimony Offered by the Defense to Establish that the Film was Not Obscene, and the Comparison Evidence Offered to Establish Current Community Standards was Properly Excluded as Irrelevant and Incompetent.

At the trial, the defense sought to present the opinions of various witnesses connected with the arts and the motion picture industry that the film "Flaming Creatures" was not hard-core pornography. The appellants also offered the opinions of two psychiatrists that the film was not obscene. All of this testimony was properly rejected. The personal opinion of any individual on the issue of whether a particular item is obscene—regardless of the individual's training in the arts, sociology or psychiatry—has no relevancy to the ultimate question before the court, which must be decided upon the basis of what is patently offensive to the average man applying present-day community standards [*Manual Enterprises v. Day,* 370 U. S. 478 (1962); *Roth* v. *United States,* 354 U. S. 476 (1957)].

The appellants claim, however, that the testimony of the witnesses who were versed in the arts was offered to establish the redeeming social importance of the film, and the exclusion of their testimony precluded the presentation of such a defense. But the record clearly shows that the questions put to these witnesses called more for their opinions regarding prurient appeal, community standards and hard-core pornography than for their critical evaluation of the artistic content of the film (145-7, 170-1, 181, 239-40, 274-5). When the defense offered a published critical review of "Flaming Creatures," untainted by unqualified conclusions as to its standing under the law, the article was admitted into evidence and the author allowed to elaborate

upon her opinion regarding the film's artistic merit (190-222). Testimony concerning the use of the motion picture as an instructual aid in an adult mythology course was also admitted into evidence (246-9). Thus, the court did not prevent the defense from attempting to establish the film's redeeming social importance, it only rejected incompetent offers of proof.

The appellants also sought to introduce testimony at the trial to establish that several motion pictures considered by the witnesses presented to be comparable in content to the instant film, were at that time in national distribution (154-6, 199-200, 203-5). This testimony, offered for the purpose of showing what the community's standards are, was excluded by the court as incompetent. The authority in New York for such exclusion is *People* v. *Finkelstein*, 11 N. Y. 2d 300 (1962), cert. denied 371 U. S. 863 (1962). In that case, the defendant, after eliciting from the police witness testimony that certain named magazines had been seen by the officer on newsstands in New York City, offered them in evidence as a standard for comparison with the exhibits in the case. The New York Court of Appeals sustained the trial court's exclusion of such evidence:

> "Finally, [the defendant] suggests that the trial court erred in refusing to receive evidence allegedly bearing upon current community standards regarding obscenity * * *. Counsel offered a book and magazines in evidence 'to indicate to your Honors what is the current standard in the community, of literature, and by comparing them you will see whether or not they are permissible.'
>
> "In our opinion, the proffered evidence was properly excluded, as it was irrelevant to the issue of

whether or not the two books sold by the defendants in this case were obscene. The different publications were *seen* in bookstores and on magazine stands in New York City is no indication that they were *sold*, or *read*, or that to the average person applying contemporary community standards (*Roth* v. *United States, supra*) they were not obscene" (305). (Italics in original.)

In the instant case, the mere circulation of other films does not establish that the public has accepted these offerings as being within the community standards of permissible candor.

Nor has this Court ever ruled that due process compels the acceptance of comparison evidence in obscenity prosecutions. Justice HARLAN, in an opinion which was part concurrence and part dissent in *Smith* v. *California*, 361 U. S. 147, 172 (1959), made the following observation concerning the exclusion of oral expert testimony on the issue of community standards:

"I would not hold that any particular kind of evidence must be admitted, specifically, that the Constitution requires that oral opinion testimony by experts be heard. * * *. Where there is a variety of means, even though it may be considered that expert testimony is the most convenient and practicable method of proof, I think it is going too far to say that such a method is constitutionally compelled, and that a State may not conclude, for reasons responsive to its traditional doctrines of evidence law, that the issue of community standards may not be the subject of expert testimony. I know of no case where this Court, on constitutional grounds, has required a State to sanction a particular mode of proof." [361 U. S. at 172.]

New York has determined that evidence such as that offered by the appellants is not competent to establish the standards of the community. Due process does not remand another result.

Conclusion

The appeal should be dismissed, or the judgment below affirmed.

Respectfully submitted,

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November, 1966

SUPREME COURT, U. S.

FILED
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JOHN E. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 660

KENNETH JACOBS, FLORENCE KARPF
and JONAS MEKAS,
Appellants,

v.

PEOPLE OF THE STATE OF NEW YORK,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW YORK,
APPELLATE TERM, FIRST JUDICIAL DEPARTMENT

APPELLANTS' REPLY TO MOTION TO DISMISS OR AFFIRM

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IN THE

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OCTOBER TERM, 1966

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Appellants,

v.

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Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE TERM, FIRST JUDICIAL DEPARTMENT

APPELLANTS' REPLY TO MOTION TO DISMISS OR AFFIRM

Pursuant to Rule 16(3) of the Revised Rules of the Supreme Court of the United States, appellants submit this brief in reply to the motion of the appellee to dismiss this appeal on the grounds that the appeal is moot and does not present a substantial federal question.

POINT I

The appeal is not moot.

Appellee contends that this appeal should be dismissed as moot since appellants received suspended sentences. Such a proposition is supported neither by reason, justice or precedent. First, precedent supports appellants' right to have their criminal conviction reviewed by this Court.

Mishkin v. *New York*, 383 U. S. 502 (1966) (Court's Opinion, ftn. 3); *Wetzel* v. *Ohio*, 371 U. S. 65 (1962); *Pollard* v. *U. S.*, 352 U. S. 354 (1957); *U. S.* v. *Morgan*, 346 U. S. 502 (1953); *Fishwick* v. *U. S.*, 329 U. S. 211 (1946); and *Redrup* v. *New York*, #3 Oct. 1966 Term. Furthermore, it is evident that all manner of "penalties or disabilities" flow from this judgment of conviction under New York law.

For example, the conviction herein will result in a deprivation of the appellants' property rights in the film print and the motion picture equipment seized at the time of appellants' arrest. Under Article 71 of the Civil Practice Law and Rules of New York, all of the appellants because of their superior possessory interests will at the conclusion of this proceeding be entitled to bring an action to recover possession of the film and the equipment.* 13 Carmody-Wait, *Cyclopedia of New York Practice, Replevin*, § 26; 7B McKinney's New York Laws, *CPLR 7101-Practice Commentary* at pp. 385-87. Nevertheless, were the conviction here permitted to stand, the holding that the film was obscene would by implication remain unchallenged and the film and the equipment will be subject to forfeiture. *Penal Law*, § 1141-c; Code of Criminal Procedure, § 22-a. Thus, appellants' pecuniary interest in the outcome of this litigation established their right to have convicitions reviewed by the Court. *Wetzel* v. *Ohio, supra.*

A more collateral effect, but a more likely source of adverse consequences to appellants is the Administrative Code of the City of New York. The Code sets up an entire system of licensing procedures for motion pictures. Chap. 32, Title B. The Code specifically provides that the Depart-

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* The film print and the equipment are owned by the Film Makers' Cooperative, which is a non-profit membership corporation under New York law. Since all of the appellants are members of the Cooperative, they have a direct financial interest in the property. *Membership Corporation Law*, § 55.

ment of Licenses shall assure that the motion picture theatres are not conducted in a manner offensive to "public morals". § B32-26.0. Under this section the Department of Licenses has attempted to revoke motion picture theatre licenses on the claim that obscene pictures have been shown. § B32-6.0. Since appellants have been and are still deeply involved in the showing of motion pictures in New York City, the upholding of their conviction on the grounds of showing an obscene film may well be used as a basis to deprive them of the right to continue to show motion pictures at theatres operated or leased by their organization, the Film Makers Cooperative or by themselves personally. § B32-6.0.

Finally, appellants would urge this Court that their interest in removing the stain which a criminal conviction inevitably imposes upon anyone, gives them an interest of sufficient weight so as to permit them the right to assert that their convictions were constitutionally defective and in violation of their rights under the First Amendment. In *Wetzel* v. *Ohio*, this Court held that a few hundred dollars costs assessed against the estate of a deceased defendant entitled his estate to continue to prosecute the appeal from the decedent's criminal conviction. So, too, the possible loss of a nominal amount of money by a criminal defendant either in the form of a fine or costs constitutes a "case or controversy" that permits this Court to review his criminal conviction., *Peterson* v. *Greenville*, 373 U. S. 244 (1963); *Wright* v. *Georgia*, 373 U. S. 284 (1963). It is difficult to understand the argument that the imposition of a nominal fine is sufficient to invoke this Court's jurisdiction, while the removal of a stigma of a criminal conviction should not be recognized as a sufficient ground for obtaining appellate review by the Court of the grave constitutional questions raised by the appellants' conviction. Moreover, since habeas corpus is not available to a defendant receiving a suspended sentence, only by direct review

of his conviction by this Court can he obtain a hearing in a federal court of his claim that his First Amendment rights have been violated by his conviction.

POINT II

Appellee's argument demonstrates that this appeal presents substantial federal questions.

The discussion in appellee's brief of the various issues raised by the Jurisdictional Statement only reinforces appellants' contention that substantial federal questions are presented by this appeal. Two examples will suffice. On the issue of *scienter*, it is pointed out that this very issue is presently before the Court in the case of *Redrup* v. *New York*, No. 3 Oct. 1966 Term. Otherwise, the argument only points out the gravity of the threat to First Amendment rights posed by the lack of a defense of "honest mistake". The alleged difficulties raised by such a defense are easily solved when it is recognized that such a defense would pose no more difficulty than any fact question. A claim of "honest mistake" would be negated where there is evidence of a commercial exploitation of sex as in *Mishkin* v. *New York*, 383 U. S. 502 (1966). Not only is any evidence of commercial exploitation wholly absent here, but the opposite is established by the record.

The appellants considered the film as well as the many other films produced by the members of Film Makers Cooperative as works of art, treated them as such and expected others to do likewise (238-39; 255, 257-58). Consequently, the question of *scienter* is directly involved here where appellants were sincerely engaged in a legitimate artistic activity. Yet their conduct was held to be criminal. Appellants contend therefore that their convictions violate their First Amendment rights.

Appellee also correctly acknowledges that the Court has agreed to review the issue of what proof must be offered

by the State in an obscenity case. *Phelper* v. *Decker*, #374 Oct. 1966 Term.

Appellants will not repeat the arguments previously discussed in their Jurisdictional Statement. Two comments on Appellee's motion are however clearly required. First, Appellee argues that the film has "no possible social or artistic value". That basis of this wholly subjective statement is unsupported by any proof in the record since Appellee offered none. On the other hand, where appellants proffered evidence that many persons active in the arts and the cinema believe "Flaming Creatures" to be a work of clear artistic merit and, moreover, totally devoid of erotic or prurient appeal, the offer was rejected. The fact that judges or attorneys are permitted to substitute personal beliefs for evidence in a court of law only substantiates the validity of appellants' claim of constitutional error in the Trial Court's exclusion of the proffered evidence. The threat to First Amendment rights inherent in a rule which permits the Trial Court to take judicial notice of the issue of obscenity is revealed by appellee's conclusory statements concerning the film.

Second, there is a clear misstatement of the record in appellee's brief. The brief states that appellants' offers of proof on the issue of the film's redeeming social importance were properly excluded on the technical grounds that the witnesses were not asked for "critical evaluation of the artistic content of the film" (Appellee's Brief, p. 11). The record clearly indicates that the basis for the objection to appellants' offer of proof was that the defendant objected "to any line of questioning dealing with a question of artistic merit or community standards" (R. 135-36). Moreover, all technical objections were specifically waived (R. 152, 158-162). Under New York law, a specific objection to evidence which is then excluded can be sustained on appeal only on that basis. *Bloodgood* v. *Lynch*,

293 N. Y. 308; *People* v. *Weinberger*, 239 N. Y. 307; *Touley* v. *Bacon*, 70 N. Y. 34.

The belated attempt to justify the exclusion of expert testimony on the basis of an objection to the form of questions is not only a complete distortion of the record, but it also is an implicit admission of error in the rulings below. Moreover, the reason that appellee now gives for accepting the written review was not the one offered by appellee at the trial. As noted above, there the appellee argued that the Court should reject all oral expert testimony on the issue (R. 161-62). The basis for its position is difficult to fathom, but necessarily cannot be accepted especially where, as here, we are dealing with new works of art that have had limited exposure and thus have not had any substantial opportunity for critical comment to be published. In any event, the record clearly indicates that appellants' witnesses were quite prepared to discuss the film's artistic content in great detail, but the Trial Court's ruling excluded such proof.

CONCLUSION

The motion to dismiss the appeal or affirm the judgment below should be denied. The Court should note probable jurisdiction and reverse the judgment below.

Respectfully submitted,

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DAVID G. TRAGER,
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966.

JACOBS ET AL. *v.* NEW YORK.

APPEAL FROM THE APPELLATE TERM OF SUPREME COURT OF NEW YORK, FIRST JUDICIAL DEPARTMENT.

No. 660. Decided June 12, 1967.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed as moot.

MR. JUSTICE BRENNAN would affirm the judgment of the lower court.

MR. JUSTICE FORTAS would reverse the judgment of the lower court.

MR. CHIEF JUSTICE WARREN, dissenting.

I dissent from the Court's dismissal of this appeal as moot. These appellants were convicted by a three-judge bench of the Criminal Court of New York City of violating § 1141 of the Penal Law of New York, which provides in pertinent part:

> "1. A person who sells, lends, gives away, distributes, shows or transmutes . . . any obscene, lewd, lascivious, filthy, indecent, sadistic, masochistic . . . motion picture film . . . which may or may not require mechanical or other means to be transmuted into auditory, visual or sensory representations of such character . . . .
>
> "2. Is guilty of a misdemeanor, and, upon conviction, shall be sentenced to not less than ten days nor more than one year imprisonment. . . ."

On August 7, 1964, appellants Jacobs and Mekas were sentenced to 60 days in the New York City Workhouse,

with execution of the sentence suspended. Appellant Karpf received a suspended sentence.

In dismissing this appeal for mootness, the Court apparently bases its action upon the fact that under New York law, the maximum time during which appellants could have had their suspended sentences revoked and replaced by prison sentences was one year from the date of the original sentences. N. Y. Code Crim. Proc. § 470-a. The State argues that this appeal is moot because more than one year has run from August 7, 1964, and appellants are under no present threat of imprisonment. Moreover, the State contends that neither New York law nor federal law imposes any further penalty for conviction of the misdemeanor involved in this case.

I cannot accept this argument. The practical result of the Court's willingness to dismiss this appeal as moot is that States may insulate their convictions under laws raising constitutional questions from review on the merits by this Court by the simple expedient of a suspended sentence where a time limit for the imposition of an executed sentence is short enough to run before an appeal can be taken to this Court. A State could thus keep a person under continual threat of imprisonment without review by this Court of any constitutional objections to his convictions by a continued series of convictions and suspended sentences. By the time any single conviction could be brought to this Court, the defendant's jeopardy under that particular sentence would be concluded. However, the defendant could still be oppressed by subsequent suspended sentences which would themselves be unreviewable by the time the defendant could bring his case to this Court. I cannot agree that the commands of the United States Constitution can be this easily suspended by the States. Moreover, this power, which under this dismissal can

be exercised without constitutional restraint, gives the State a weapon which might in some cases be used to suppress constitutionally protected conduct. After a person has been convicted under a statute which limits his right of expression, his subsequent conduct will be significantly chilled by the conviction on his record. Particularly where, as in this case, the conviction stems from conduct which is directly in line with appellants' profession as movie exhibitors, they may justifiably fear that any future conduct running the danger of infringing the statute will be more harshly treated because of the previous unreviewed conviction. Who can doubt that a judge's reaction to another conviction under § 1141 of the New York Penal Law would not be colored by the fact of a prior conviction? For example, these appellants argue in this case that they should not be constitutionally convicted because their conduct demonstrates their good-faith belief that they were not exhibiting obscene material. They may have felt that even if a state judge did not accept their constitutional argument based on their good faith, he might at least give the appellants the most lenient sentence. However, once they have been convicted and have been unable to have the constitutionality of the conviction passed upon by this Court, their situation is radically different. Even if they have been convicted of engaging in what this Court might finally determine to be constitutionally protected conduct, they are likely to order their future conduct on the basis of the assumed validity of previous conviction. When we are dealing with First Amendment freedoms, freedoms we have held require breathing space to survive, see *New York Times* v. *Sullivan*, 376 U. S. 254 (1964), *NAACP* v. *Button*, 371 U. S. 415 (1963), we should be extremely slow to accept mootness doctrines which grant the States an unreviewable power to suppress modes of expression.

I believe the Court is straining the mootness doctrine and in doing so is bypassing important constitutional questions in the obscenity area which this Court has an obligation to decide. In this case, we are presented with an opportunity for injecting some clarity into the problem of what constitutes obscenity, a problem which has become increasingly muddled and difficult for the federal and state courts and legislatures to understand since we first defined the reach of the First Amendment in this area in *Roth* v. *United States*, 354 U. S. 476 (1957). The questions presented are not easy, but I am sure that it is our constitutional duty to grapple with them and to present to the country an understandable statement of how far the First Amendment restricts legislative attempts to control obscene material. Similarly, the Court dismisses as moot the appeal in No. 993, *Tannenbaum* v. *New York*, because a jail sentence was suspended and a fine has been paid. That case raises the important question never addressed by this Court of the constitutionality of "variable obscenity" laws which restrict the sale of obscene materials to minors on the basis of definitions of obscenity drawn expressly with minors in mind. While I do not express a view as to the merits of this question, I think the great importance of the question to the Nation, and the responsibility of this Court to elaborate the scope and meaning of the First Amendment, should require the Court to note jurisdiction and hear the case on the merits. A similar strained conception of mootness resulting in a failure of decision on the merits recalls the Court's avoidance of a constitutional decision in the short *per curiam* in *Parker* v. *Ellis*, 362 U. S. 574 (1960). I expressed the belief in that case, which I reaffirm here, that this Court has an obligation to decide, and not avoid, important constitutional questions which are concretely presented to it by litigants having adverse interests. If Congress had intended for our jurisdiction to be discretionary in all cases, it would not have differ-

entiated in the statutes defining our appellate jurisdiction between appeals and writs of certiorari.

As MR. JUSTICE DOUGLAS points out in his dissent to the dismissal for mootness in this case, there are additional reasons why this case should not be deemed moot. Appellants' film and equipment were seized by the police at the time of their arrests. Of course, if appellants were not convicted, or if their convictions were reversed, they would be entitled under state law to the return of their property. On the other hand, our dismissal leaves these convictions unchallenged, and appellants' film and equipment will be subject to forfeiture. New York Penal Law § 1141–c, N. Y. Code Crim. Proc. § 22–a. Thus, appellants have a clear pecuniary interest in the outcome of this appeal. Appellants also point to the likelihood that these convictions will impair their ability to secure a license to operate a motion picture theatre. Under the Administrative Code of the City of New York, which establishes a comprehensive system of licensing procedures, the Department of Licenses is charged with assuring that motion picture theatres are not offensive to "public morals." § B32–26.0. These convictions will surely affect appellants' ability to procure a license to exhibit motion pictures in the future.

Since I believe this appeal cannot be dismissed as moot, I believe the Court must consider the case on the merits. I am satisfied that these convictions should be affirmed. Under the standards set out by the Court in *Roth* v. *United States*, 354 U. S. 476 (1957), this film is not within the protections of the First Amendment. We formulated the test in that case as being whether the material was utterly without social value, whether it went substantially beyond customary limits of candor in representing sexual matters, and whether "to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interests." *Supra*, at 489. This film falls out-

side the range of expression protected by the First Amendment according to the criteria set out in *Roth*.

For the reasons I have given, I would consider this appeal on the merits and I would affirm this conviction.

MR. JUSTICE DOUGLAS, dissenting.

We have here two cases in which appellants have been convicted under a State's obscenity statutes. In No. 660, appellants were convicted of showing an allegedly obscene motion picture. They were given suspended sentences and the time during which the suspended sentences could have been revoked and prison sentences imposed has now passed. In No. 993, appellant was convicted of selling an allegedly obscene magazine to a person under 18. He was sentenced to 30 days and fined $100. The fine has been paid and the sentence was suspended. The First Amendment issues in these cases are substantial. Nonetheless, they are dismissed as moot because the appellants are no longer subject to the custody of the State and in No. 933 the fine has been paid. The Court apparently believes this result to be commanded by our prior cases. I disagree.

The mootness doctrine is expressive of the need for antagonistic parties whose vigorous argument will sharpen the issues. It is part of the "case or controversy" requirement of Article III. *St. Pierre* v. *United States*, 319 U. S. 41, 42. But it is not so rigid as to defeat substantial rights, nor so inflexible as to prevent this Court from facing serious constitutional questions. Thus, we have held that service of a sentence does not render a case moot where the conviction, if allowed to stand, will result in collateral disabilities such as a loss of civil rights. *Fiswick* v. *United States*, 329 U. S. 211; *United States* v. *Morgan*, 346 U. S. 502.

In the present cases, we are in the area of the First Amendment. Over and over again we have stressed that First Amendment rights need "breathing space to survive" (*NAACP* v. *Button*, 371 U. S. 415, 433); and we

have been watchful lest coercive measures exercise an *in terrorem* effect which intimidates people from exercising their First Amendment rights. See, *e. g.*, *Speiser* v. *Randall*, 357 U. S. 513; *NAACP* v. *Button*, *supra*; *Keyishian* v. *Board of Regents*, — U. S. —. We have been mindful that "[t]he threat of sanctions may deter . . . almost as potently as the actual application of sanctions." *NAACP* v. *Button*, *supra*, at 433. Accordingly, we have modified traditional rules of standing and prematurity to fit the peculiarities necessary to ensure adequate protection to First Amendment rights. See *Dombrowski* v. *Pfister*, 380 U. S. 479.

The *in terrorem* effect of denying review to cases such as these because sentences have been suspended or short sentences served is obvious. Sentences for violations of obscenity statutes are often suspended and generally short. If those convicted cannot obtain ultimate review of such convictions, merely because of the shortness of the sentence and the slowness of the judicial process, many will choose to comply with what may be an invalid statute. Many may steer wide and refrain from showing or selling protected material. First Amendment rights are thus stifled. If a practice such as this were shown to exist, its *in terrorem* effect on all publishers would certainly be sufficiently clear as to give any of them standing to bring an action for declaratory relief. Its *in terrorem* effect on a publisher who has actually felt the harsh impact of the law is so obvious that its continuing deterrent effect upon him should keep his case from becoming moot.

In No. 660, appellants' film and motion picture equipment were seized at the time of their arrest. They argue that at the conclusion of this proceeding they can bring an action to recover possession of the film and equipment. If their convictions are allowed to stand, along with the holding that the film is obscene, the film will be subject to forfeiture. They also argue that the department of licenses may suspend their motion picture theater license

on the ground that they have shown obscene pictures. Perhaps they could relitigate the question of the film's obscenity in such proceedings. That is, of course, a matter of state law. But if appellants are correct, the convictions may entail sufficient collateral consequences that distinguish them from *St. Pierre* v. *United States, supra,* and bring them within the *Fiswick* and *Morgan* cases.

The questions of mootness loom so large in the setting of the First Amendment that they should at least be briefed and argued.

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